Construction and General Laborers' Local Union #190, Albany, New York and Vicinity, AFL–CIO *and* ACMAT Corporation and Sheet Metal Workers International Association, AFL–CIO and Sheet Metal Workers International Local Union No. 83, AFL–CIO. Case 3–CD–601

December 31, 1990

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS CRACRAFT, DEVANEY, AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed on October 12, 1989, and the amended charge was filed on October 20, 1989, by ACMAT Corporation (ACMAT or the Employer), alleging that the Respondent, Construction and General Laborers' Local Union #190, Albany, New York and Vicinity, AFL–CIO (the Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Sheet Metal Workers International Association, AFL–CIO and Sheet Metal Workers International Local Union No. 83, AFL–CIO (Sheet Metal Workers Local 83). The hearing was held on November 29 and 30 and December 21, 1989, before Hearing Officer Nancy R. MacIntyre.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

ACMAT Corporation is engaged in the business of asbestos abatement throughout the United States, including Albany, New York. ACMAT Corporation annually derives gross revenues in excess of $500,000, and purchases and receives equipment and materials valued in excess of $50,000 from suppliers located outside the State of New York.[1] We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and Sheet Metal Workers International Association and its Local 83 are labor organizations within the meaning of Section 2(5) of the Act.

[1] Although the parties did not specifically stipulate the underlying facts to establish jurisdiction, the jurisdictional facts were not disputed and are supported by evidence in the record. Further, we take judicial notice that in *Laborers Local 104 (ACMAT Corp.)*, 295 NLRB 692 (1989), the Board found that ACMAT met its standard for asserting jurisdiction. See *Spring Valley Farms*, 274 NLRB 643 (1985); *Longshoremen ILA Local 1408 (Jacksonville Container)*, 285 NLRB 644 (1987).

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer, whose corporate offices are in Connecticut, is in the construction industry and has been in business for approximately 40 years. Around 1976, as the latent dangers associated with asbestos became apparent, the Employer became involved in the removal, or abatement, of asbestos.

Throughout its history, the Employer had collective-bargaining agreements with many building trade unions. When ACMAT started in the asbestos abatement field, it used employees represented by various unions on its projects. This arrangement, however, was not satisfactory because disputes arose over which trade was entitled to perform a specific task. These disputes resulted in production delays, cost overruns, and friction among employees represented by the different unions.

In order to compete more effectively, the Employer decided to use a single group of workers who were trained in all phases of the asbestos abatement process. The Employer learned that the Sheet Metal Workers had begun a nationwide training program designed to give its members comprehensive training in all phases of asbestos abatement. In ensuing meetings and discussions the Employer ascertained that the Sheet Metal Workers' training program would be comprehensive and complete and that the training would be available on a localized basis. The Employer was convinced that the Sheet Metal Workers could provide it with the skilled workers it needed. In late 1986 and early 1987, the Employer sent letters to various unions, including the Laborers, terminating the agreement or indicating that agreements would not be renewed or extended unless ACMAT specifically agreed in writing. In December 1987, the Employer and the Sheet Metal Workers executed a nationwide agreement covering all asbestos abatement work engaged in by the Employer.

Sweet Associates, Inc. is a general contractor engaged in building construction and renovation work within approximately a 100-mile radius of Albany, New York. Sweet Associates was awarded a contract by the State of New York for work on the third floor of the Old State Education Building in Albany, New York. The project included asbestos abatement as well as ordinary demolition work. Because Sweet Associates is not licensed to perform, and does not perform, asbestos abatement, it subcontracted that phase of the work. After considering about 12 firms, Sweet Associates selected ACMAT as its subcontractor.

Sweet Associates maintains collective-bargaining agreements with several trade unions, including Laborers. Sweet Associates has no agreement with Sheet Metal Workers Local 83. When Sam Fresina, the business manager of Laborers, learned that Sweet Associ-

ates was considering subcontracting asbestos abatement work to ACMAT, he protested that this would violate the subcontracting clause of the contract between Sweet Associates and Laborers Local 190.[2]

During August 1989, Fresina spoke to Robert Fortune, president of Sweet Associates, on several occasions and demanded that the asbestos abatement work should be done by employees represented by Laborers rather than Sheet Metal Workers. Fresina told Fortune that the Laborers could not allow employees represented by the Sheet Metal Workers to perform any of the disputed work. Fresina testified that he had stated to Fortune, ''We can't split our work with Sheet Metal Workers. We can't give what is 100 percent ours to another craft. It's our work.'' Fortune testified that Fresina threatened that there would be ''massive demonstrations'' and ''labor disruptions'' if the work was not shifted from sheet metal workers to laborers. Fortune also testified that Fresina threatened that ''the job would not progress'' and ''it would be financially a problem for all those involved,'' and ''it just couldn't be allowed by the laborers to have sheet metal workers do this work.'' Bryan Marsh, vice president of ACMAT, testified that he attended a meeting in September 1989 at which Fresina stated that he would insist that the work be done on the job by laborers and that he did not want sheet metal workers doing the work. Marsh also testified that Fresina said he wanted ACMAT to sign an agreement with the Laborers if it came on site to do the work. Fresina admitted saying that, if ACMAT did not comply with Sweet Associate's agreement, there would be a problem and there might be a demonstration, but Fresina said he never mentioned picketing or demonstrating at the jobsite.

B. *Work in Dispute*

The disputed work involves removal of asbestos from the third floor of the Old State Education Building in Albany, New York.

C. *Contentions of the Parties*

The Employer and the Sheet Metal Workers contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. They further argue that the work in dispute should be awarded to employees represented by the Sheet Metal Workers based on their collective-bargaining agreement, relative skills and training, past practice, economy and efficiency of operations, employer preference, and a prior Board determination.[3]

The Laborers moves to quash the notice of hearing on the ground that there is no reason to believe that a violation of the Act has occurred. The Laborers contends that vague or ambiguous threats such as those alleged here which are unsupported by later misconduct do not constitute reasonable cause to believe that Section 8(b)(4)(D) has been violated. The Laborers also contends that this is a subcontracting rather than a jurisdictional dispute, and that the Board has unequivocally held that activity in support of a subcontracting claim is not jurisdictional in nature and is not the basis for an 8(b)(4)(D) complaint.

With regard to the merits, the Laborers contends that the work in dispute should be awarded to employees it represents based on area and industry practice, relative skills and experience, economy and efficiency of operations, past practice, and a 1980 award of the Joint Board. The Laborers asserts that the collective-bargaining agreement between the Employer and the Sheet Metal Workers creates a conflict of interest and cannot support an award of the work in dispute to employees represented by Sheet Metal Workers Local 83.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claim and that there are competing claims to disputed work between rival groups of employees.

As noted above, Robert Fortune, president of Sweet Associates, testified that in August 1989 he had a series of conversations with Sam Fresina, business manager of Laborers, during which Fresina stated that if asbestos work was performed by employees represented by Sheet Metal Workers rather than Laborers-represented employees, there would be ''labor disruptions'' and ''massive demonstrations,'' the job would not progress, and it would be financially a problem for all those involved.[4] Bryan Marsh, vice president of ACMAT, testified that during a September 1989 meeting Fresina stated that he would insist that the work be done on the job by laborers, that he did not want sheet metal workers doing the work, and that he wanted ACMAT to sign an agreement with the Laborers if

[2] That agreement has a subcontracting clause that requires that subcontractors performing bargaining unit work be signatory to the agreement. However, the agreement contains exceptions, one of which expressly permits work thereunder to be subcontracted to a company whose employees are represented by another union that is affiliated with the AFL–CIO in this geographical jurisdiction.

The Laborers filed a subcontracting grievance against Sweet Associates which was submitted to a joint board of arbitration. Neither ACMAT nor the Sheet Metal Workers was party to that proceeding. The arbitration board sustained the Laborers' grievance only insofar as holding that Sweet should have directed ACMAT to meet with representatives of Laborers prior to the time the subcontract was awarded. The arbitration decision did not hold that Sweet's subcontract of the disputed work to ACMAT was improper.

[3] *Laborers Local 104 (ACMAT Corp.)*, 295 NLRB 692 (1989).

[4] Fresina's testimony conflicted with Fortune's in some respects. However, in 10(k) proceedings, a conflict in testimony does not prevent the Board from finding evidence of reasonable cause and proceeding with a determination of the dispute. *Laborers Local 334 (C. H. Heist Corp.)*, 175 NLRB 608, 609 (1969).

ACMAT came on site to do the work. Accordingly, in light of Fortune's testimony concerning ''labor disruptions'' and ''massive demonstrations,'' we find that if there are competing claims to disputed work between rival employee groups, there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

Laborers contends that this is a subcontracting rather than a jurisdictional dispute, and that activity in support of a subcontracting claim is not a jurisdictional claim. We disagree. Under Board precedent, the Laborers' subcontracting grievance constitutes a claim for the work.[5] We further find that Fresina's statements to Fortune and Marsh, as well as the filing of the grievance, constitute a demand for the work. Consequently, we conclude that there are active competing claims to disputed work between rival groups of employees.[6]

Further, the record reveals no agreed-on method among the parties for the resolution of the dispute.[7]

We therefore find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Employer preference and past practice

Prior to 1987, ACMAT used composite crews, which included, among others, employees represented by the Laborers and Sheet Metal Workers Unions. Since the fall of 1987, ACMAT has used only employees represented by the Sheet Metal Workers on more than 150 asbestos abatement jobs (over 98 percent of ACMAT's projects). These have included a number of projects within 100 miles of Albany. The Employer is satisfied with the sheet metal workers' performance and prefers that the work in dispute be done by employees who are represented by Sheet Metal Workers Local 83. These factors therefore favor awarding the work in dispute to employees represented by Sheet Metal Workers Local 83.[8]

2. Economy and efficiency of operations

Marsh testified that, prior to signing an agreement with the Sheet Metal Workers, ACMAT used composite crews with employees represented by various unions. This resulted in increased costs, production delays, and friction among employees. Since 1987 more than 98 percent of ACMAT's asbestos abatement work has been done by employees represented by the Sheet Metal Workers. The Sheet Metal Workers' crews have a ratio of one journeyman to three classified workers. Marsh testified that it was beneficial to have journeymen on the crews and that it resulted in overall economies. Journeymen have gone through the apprenticeship ranks and are trained not only as asbestos workers but as skilled tradespeople. Journeymen are able to read and work with blueprints and are better trained from the standpoint of layout in the more sophisticated parts of the abatement business. In the past when there was a difficult layout, ACMAT had to use carpenters to do the layout because the Laborers-represented employees were not qualified to perform the work. However, the Employer did not have that difficulty when it assigned the work to employees represented by Sheet Metal Workers. Accordingly, it is more efficient for the Employer to use sheet metal workers, who have skills beyond actual asbestos abatement skills which are needed on certain jobs.

Further, the record also indicates that Sheet Metal Workers provides a more stable source of labor. Marsh

[5] See *Laborers (O'Connell's Sons)*, 288 NLRB 53 (1988); *Sheet Metal Workers Local 107 (Lathrop Co.)*, 276 NLRB 1200, 1202 (1985).

[6] *Carpenters Local 33 (Blount Bros.)*, 289 NLRB 1482 (1988), relied on by Laborers, is distinguishable. Blount involved the issue of whether pursuit of a grievance after a 10(k) award constituted coercion within the meaning of Sec. 8(b)(4)(ii)(D). The instant case, on the other hand, involves the separate issue of whether there are competing claims to the work. Accordingly, we deny the Laborers' motion to quash the notice of hearing.

[7] We find no merit in the Laborers' contention that the arbitration proceeding conducted pursuant to the collective-bargaining agreement between Laborers and Sweet Associates constituted an agreed-on method for the voluntary adjustment of the dispute. It is well established that the ''voluntary adjustment must bind all disputing unions as well as the Employer in order to come within the meaning of voluntary settlement as set out in Section 10(k).'' *Laborers Local 1184 (H. M. Robertson Pipeline)*, 192 NLRB 1078, 1079 (1971). See *NLRB v. Plasterers Local 79 (Texas State Tile Co.)*, 404 U.S. 116 (1971). In this case, it is undisputed that ACMAT and Sheet Metal Workers were not parties to the arbitration proceeding.

[8] As noted above, the Employer and the Sheet Metal Workers contend that the collective-bargaining agreement between them favors award of the work in dispute to employees represented by Sheet Metal Workers Local 83. Because other factors exist that favor an award of the disputed work to employees represented by Sheet Metal Workers Local 83, we find it unnecessary to consider the agreement between the Employer and Sheet Metal Workers as a factor in determining the merits of the jurisdictional dispute in this proceeding. See *Longshoremen ILA Local 1332 (Trailer Marine)*, 264 NLRB 319, 321 fn. 7 (1982).

The Laborers contends that the Sheet Metal Workers cannot represent the Employer's employees based on an offer of proof purporting to establish that the Sheet Metal Workers is disabled from representing the Employer's employees because the Sheet Metal Workers National Pension Fund has a substantial ownership interest in the Employer's business. The issue in this proceeding is the identity of the employees entitled to perform the work, not the identity of their representative. Because we find the evidence the Laborers seek to introduce is not relevant, we find it unnecessary to reopen the record to permit the Laborers to introduce evidence pertaining to the offer of proof.

testified that when using employees represented by other unions, workers were not always available and that this was particularly true of laborers. He stated that several Laborers business agents told him that it was difficult to obtain men in the summer because they would rather work outside. Marsh also indicated that there was a high turnover rate among laborers.

For these reasons we find that the factor of efficiency and economy of operations favors awarding the work in dispute to employees represented by Sheet Metal Workers Local 83.

3. Area and industry practice

The evidence shows that employees represented by both the Sheet Metal Workers and the Laborers perform asbestos abatement work in the Albany, New York area and in other areas of the United States. Thus, these factors do not favor awarding the work in dispute to either group of employees.

4. Relative skills and training

The evidence shows that employees represented by both Unions possess the requisite skills and training to perform the work in dispute. This factor does not favor awarding the work in dispute to either group of employees.

5. Certification by the Board

There are no certifications by the Board. This factor does not favor awarding the work in dispute to either group of employees.

6. Awards of joint boards

The Laborers cites a 1980 Impartial Jurisdictional Disputes Board (IJDB) decision involving several unions, including the Sheet Metal Workers International and the Laborers International. The Employer, however, was not a party to that decision. Moreover, that decision predates the changed circumstances pertaining to asbestos removal shown by the record. Under these circumstances, we accord the IJDB decision little weight.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Sheet Metal Workers Local 83 are entitled to perform the work in dispute. We reach this conclusion relying on employer preference and past practice, and economy and efficiency of operations.

In making this determination, we are awarding the disputed work to employees represented by Sheet Metal Workers Local 83, not to that Union or its members.

Scope of the award

The Employer requests a nationwide award and the Sheet Metal Workers contends that the scope of the award should be areawide, statewide, or nationwide. Generally, in order to support a broad award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area, that similar disputes are likely to recur, and that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical Workers IBEW Local 104 (Standard Sign)*, 248 NLRB 1144, 1148 (1980). We do not believe the record supports a broad award. Moreover, although ACMAT and the Sheet Metal Workers contend that the Laborers' International is fomenting illegal incidents, the Laborers' International Union is not a party to this proceeding. The Board will not issue a work award against an organization that is not a party. *Sheet Metal Workers Local 85 (Kewaunee Scientific Equipment)*, 198 NLRB 771, 773–774 (1972). Accordingly, our determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of ACMAT Corporation represented by Sheet Metal Workers International Local Union No. 83, AFL–CIO are entitled to perform the asbestos abatement work on the third floor of the Old State Education Building in Albany, New York.

2. Construction and General Laborers' Local Union #190, Albany, New York and Vicinity, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force ACMAT Corporation to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Construction and General Laborers' Local Union #190, Albany, New York and Vicinity, AFL–CIO shall notify the Regional Director for Region 3 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with the determination here.